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Nos. 369 and 382

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES,
Appellant,

v.

BLACK BALL FREIGHT SERVICE, ET AL.,
Appellees.

No. 382

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

BLACK BALL FREIGHT SERVICE, ET AL.,
Appellees.

On Appeal From the United States District Court For the Western District of Washington

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BRIEF OF CERTAIN MOTOR CARRIER APPELLEES

WILLIAM B. ADAMS
624 Pacific Building
Portland, Oregon 97204

PETER T. BEARDSLEY
NELSON J. COONEY
1616 P Street, N. W.
Washington, D. C. 20036

Attorneys for Appellees

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

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BRIEF OF CERTAIN MOTOR CARRIER APPELLEES [1]

INTRODUCTORY PARAGRAPH

These appellees do not disagree with appellants' briefs with respect to Opinion Below, Jurisdiction and Statutes And Regulations Involved. However, the questions pre-

[1] For listing, see Appendix A.

sented by these appeals are narrower than as presented in the brief of appellant, American Farm Lines (AFL). Moreover, the Statement Of The Case contained in AFL's brief presents a somewhat distorted picture of the development and operations of AFL.

I

THE QUESTIONS

1. Whether the Interstate Commerce Commission (Commission) was required, as a matter of law, to follow its regulations governing the processing and determination of temporary authority applications (hereinafter referred to as TA Rules).

2. Whether the Commission retained jurisdiction over the proceeding to reopen it after the Commission's order was stayed and proceedings for review by the lower court were begun.

II

STATEMENT

AFL was organized in 1964 as a "cooperative association" as defined by Section 15(a) of the Agricultural Marketing Act of 1929, 12 U.S.C. § 1141j.[2] The sole alleged purpose was to provide transportation services to its members. This type of service is exempted from economic regulation under section 203(b)(5) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(5).

Congress, in passing the Agricultural Marketing Act which defined and assisted in the development of agricul-

[2] Whether AFL has operated, since its inception, as a bona fide agricultural cooperative *vel non* is under consideration in a pending investigation proceeding by the Commission. That proceeding has been joined with AFL's application for permanent authority and joint hearings are presently under way. Docket Nos. MC-C-5835 and MC-129908 (Sub-No. 1). That it has not so operated is clear from the discussion, *infra*, pp. 3-6.

tural cooperatives, envisioned the growth of farmer organizations which would bring about a mutual self-help among farmers, pooling their various resources to assist one another as farmers. Congress further assisted in the development of agricultural cooperatives in passing the agricultural exemption provision of the Interstate Commerce Act. Nowhere in the legislative history of either statute is there any indication that these cooperatives could become general commodity carriers for the public at large, and the Commission has construed the section 203(b)(5) exemption to limit for-hire transportation for nonmembers to farm-related freight. In 1965, the Ninth Circuit Court of Appeals interpreted the exemption as permitting agricultural cooperatives to transport nonfarm-related freight for nonmembers to the extent such was "incidental and necessary" to the effective performance of a cooperative's farm-related operations.[3] The court related these terms to Northwest's transportation of nonfarm freight in this manner:

> incidental because limited to otherwise empty trucks returning from hauling member farm products to market, and producing a small return in proportion to Northwest's income from trucking farm products and farm supplies; necessary because it is not economically feasible to operate the trucks empty on return trips, and because the additional income obtained is no more than that required to render performance of the cooperative's primary farm transportation service financially practicable.[4]

In 1966, AFL began hauling freight for the Department of Defense (DoD). AFL claims that the provision of service to its members necessitates that it perform nonmember transportation to insure that its ve-

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[3] Northwest Agricultural Cooperative Ass'n v. Interstate Commerce Commission, 350 F. 2d 252 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[4] *Id.*, at 255.

hicles are available to members and that members' products are transported in an economically feasible manner.[5] However, shortly after AFL began transporting DoD freight, it began to conduct a general trucking operation for DoD traffic disregarding the required incidental relationship to the operations conducted for its members. In February, 1968, a United States District Court enjoined AFL from operating in round trip service for DoD where no member movement was involved.[6] Thereupon, AFL began transporting DoD traffic in one direction and moving the vehicles empty in the opposite direction in order to effect a literal compliance with the injunction. The same court, on the same grounds, again enjoined AFL from providing this transportation which lacked any incidental relationship to the transportation of farm-related commodities performed for its members.[7] Both of these judgments have been affirmed by a United States Circuit Court of Appeals.[8]

Still undeterred, AFL continued to ignore the two injunctions in order to reap the economic benefits of operating substantially as a for-hire motor carrier for DoD traffic instead of as an agricultural cooperative for the benefit of its members. Plaintiffs in the two injunction proceedings filed a show cause petition citing AFL's violations of the injunctions.[9] The court concluded that

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[5] Jurisdictional Statement of AFL, p. 5.

[6] Munitions Carriers Conference, Inc. v. American Farm Lines, 1968 F. Car. Cas. ¶ 81,993 (W.D. Okla.).

[7] Munitions Carriers Conference, Inc. v. American Farm Lines, Civil No. 68-148, D.C. W.D. Okla. May 28, 1968.

[8] Munitions Carriers Conference, Inc. v. American Farm Lines, 415 F. 2d 747 (10th Cir. 1969).

[9] AFL's implication that plaintiffs, seven motor carriers franchised by the Commission to transport general freight (including munitions), including some of the appellees in the instant proceeding, sought the injunctions and contempt ruling because its rates were generally higher than those charged by AFL, is highly mis-

AFL was in contemptuous violation of its injunctions in that the nature of AFL's operations and the fact that the bulk of its revenue is derived from government transportation demonstrated that it is in the general trucking business beyond the limited exemption allowed by law.[10] The court found that AFL's violations of the two injunctions "are demonstrative of the general devotion of defendants to their government traffic" and of "their preferential handling of such over the traffic of their own members." [11]

A further obstacle to AFL's for-hire trucking operations was Congressional enactment of legislation to specifically limit the amount of nonfarm, nonmember, traffic which could be handled under section 203(b)(5) of the Act.[12] The original bill was introduced at the request of the Interstate Commerce Commission, which sought a workable means to identify and proceed against illegal operators masquerading as legitimate farm cooperatives. The bill, as finally amended, proposed a limitation which would "enable bona fide agricultural cooperatives to continue to provide farm services without substantially affecting our national common carrier system." [13] The bill was acceptable to the Department of Agriculture, to the major farm groups—the National Council of Farmer Co-

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leading and myopic. Plaintiffs were combating what is considered in the trade "gray area" transportation, that type of competition which is unregulated, illegal and destructive not only of the involved carriers, but of the national transportation system. The Commission intervened in these cases on the side of the motor carriers.

[10] Munitions Carriers Conference, Inc. v. American Farm Lines, 303 F. Supp. 1078 (W.D. Okla. 1969), appeal docketed, No. 629-69, 10th Cir., Sept. 11, 1969.

[11] *Id.*, at 1084.

[12] Public Law 90-433, 82 Stat. 448.

[13] 114 Cong. Rec. 6760 (1968), Remarks of Senator Lausche, then Chairman, Senate Commerce Committee's Subcommittee on Surface Transportation.

operatives, American Farm Bureau Federation, and the National Grange—as well as to the transportation industry.[14]

Because of the formidable checks upon AFL's "incidental" operations and in order to continue to concentrate its efforts upon the more lucrative business of operating as a for-hire carrier for DoD traffic, AFL filed in May, 1968, the temporary authority application here under consideration. A grant of temporary authority would permit AFL to transport DoD traffic until a final determination by the Commission on the corresponding permanent authority application.[15] There is definite evidence that AFL, if permitted, would haul substantially more DoD traffic in the future. In AFL's fiscal year 1967, gross revenue from government traffic amounted to over one million dollars; in 1968, over four million dollars; and in the first six months of 1969, over four million dollars, which for the latter period constituted 65 percent of the total revenue of AFL.[16]

AFL's temporary authority application sought extensive rights to transport every type of commodity, without exception, moving on government bill of lading, between nine midwestern and southern states and five west-

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[14] Report of the Senate Commerce Committee, 90th Cong., 2d Sess., Senate Report No. 1152, page 18.

[15] Interestingly, the Commission there will have to decide whether an agricultural cooperative operating pursuant to the section 203 (b) (5) exemption may receive permanent motor common carrier authority under any circumstances. In a permanent application proceeding of another agricultural cooperative, a Commission Hearing Examiner recently found that the combination of the two operations would be repugnant to the national transportation policy and contrary to the public interest. Docket No. MC-133250 (Sub-No. 2)

[16] The figures were gathered by the Commission's Bureau of Investigation, in Docket No. MC-C-5835, Exhibit H-2. The exhibit was attached to appellees' replies to Motions of AFL For Stay Pending Appeal, filed below and with this Court (A. 412a).

ern states.[17] In an unprecedented move, DoD agreed to support this type of application.[18] The Commission's Temporary Authorities Board denied the application (A. 141a-142a) on the basis of the following evidence: a two-page letter filed by the sole supporting shipper, DoD, which noted, in very general language, that it had used the services of AFL on 1200 shipments and, due to recent court injunctions, was turned down on 700 truckloads of freight, that AFL's service was "excellent in every respect" and that its "shorter service is necessary as both a measure and a participant in 'shortening the pipeline'" of its vital military supplies. (A. 14a-15a) Protests were filed by almost a hundred motor carriers,[19] which pointed out that DoD's letter did not supply the information required under the Commission's TA Rules, that they were handicapped by the lack of any specific allegations of service deficiencies, and that they were capable and in fact were transporting DoD freight between the involved points and had not received any service complaints from DoD. (A. 16a-138a) One protestant stated that it was in receipt of a letter in which DoD wrote, five days prior to its letter of support, that DoD was "not in a position to state that there would be insufficient or inadequate service without American Farm Lines." (A. 11a, 113a-115a)

AFL petitioned for reconsideration and attempted to bolster the flimsy DoD support letter with seven exhibits

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[17] Specifically applicant seeks authority between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and on the other, points in Washington, California, Nevada, Utah and Arizona. (A. 10a-11a)

[18] The DoD witness in the hearing on AFL's permanent authority application testified that prior to its support of AFL, applications for single-line service were not being supported by DoD where adequate interline service existed. The witness testified that the policy restatement which permitted support of AFL was made in June, 1968, (MC-129908 (Sub-No. 1), Transcript, pp. 611-615)

[19] Numerous rail carriers also filed protests.

purporting to demonstrate the inadequate service of seven protestant motor carriers. Protestants filed replies to AFL's petition. On September 3, 1968, a three-member appellate division of the Commission granted the authority as sought. (A. 143a-148a)

Complaint was thereupon filed in the court below to set aside and annul the Commission grant of authority. (A. 149a-158a) On October 2, 1968, the court entered an order staying the effective date of the Commission's order. (A. 166a-167a) By order of November 5, 1968, the Commission, on its own motion, reopened the administrative proceeding in order to receive an additional statement of support from DoD and such reply statements as protestants might file. (A. 170a-171a) The Commission filed with the court below a motion to stay further proceedings, two days *after* it reopened the proceeding before it. (A. 167a-168a) Plaintiffs replied to the Commission's motion, but the Commission never called the motion for argument. (A. 392a)

The new statement of DoD was nothing more than an expanded version of its prior support letter—rife with generalized and unsupported statements of immediate and urgent need and void of the requested and required specificity. Following is a digest of the "evidence" contained in DoD's second support statement:

DoD stated that it "must effect movement of a vast quantity of a multitude of different commodities between innumerable points and places within the United States and abroad." In an 11-month period, DoD stated that it shipped some 720,000 tons westbound and some 250,000 tons eastbound between the states involved in the AFL application. This tonnage is broken down by origin states. Some 150 specific points in the involved states are then listed as origin and destination points; some 45 categories of commodities are named. (A. 195a-198a)

However, DoD indicated that only a "part" of this traffic requires expeditious handling and that this constitutes the basis of its support for AFL's application. Nowhere does DoD specify the portion requiring expedition. Thus the Commission was still without any specific information as to the *volume or traffic*, the *commodities* and the *points* in the involved territory requiring the services of AFL, which information the Commission had very clearly requested in its order of November 5.

DoD feels that the speed it requires cannot be met by existing carriers for three reasons. First, the "majority" of the service of certificated carriers is provided on a joint-line, rather than a single-line, basis. Secondly, "virtually all" carriers have authority over prescribed routes and travel over greater distances than if they held irregular route authority. And thirdly, "some" carriers use single drivers instead of two-man driving teams and use more than one power unit because "some" carriers do not license their power units in all states. (A. 198a-199a) These declarations were supported by complaints involving only two joint-line movements—one from McAllester, Okla., to Bangor, Wash., and one from San Jose, Calif., to Doyline, La. (A. 200a) The service was deemed inadequate when compared to the service of *existing* single-line carriers operating between those points! Thus, the only examples of poor service were between points where DoD admitted the existence of adequate service from other existing carriers. As throughout the statement, all carriers remained unnamed.

On the basis of its reasoning and the two examples, DoD next listed those points (28 origins to various destinations) between which it claimed no knowledge of single-line service. (A. 201a-203a) Again, DoD did not demonstrate that existing joint-line services between those points was unsatisfactory, or that any of the traffic moving between the points required expedition.

Finally, DoD asserted that there was need for expedited service in order (1) to guarantee the coordination of the arrival of inbound shipments with production schedules of various manufacturing plants and (2) to coordinate deliveries at air and sea ports before scheduled airlift or ship loading dates. (A. 204a-205a) But DoD submitted merely its own conclusions, without proffering the requisite evidence required by the TA rules to enable the Commission to make its determination. DoD claimed the first situation occurred at the Louisiana Ammunition Depot and the Pine Bluff Arsenal, but did not quote the actual volume of traffic moving there, any problems of unsatisfactory service from existing carriers, or other concrete evidence. Likewise, only a general allegation of the inadequacy of presently certificated carriers was made with regard to the second situation and only on movements from St. Louis, Mo., to San Francisco, Calif.

DoD's statement, while displaying a certain rhetorical adeptness, lacked the specificity required by the Commission's TA Rules and pointedly requested by the Commission in its order of November 5, 1968. Twenty-two motor carriers, five industry organizations and certain railroads responded to DoD's latest statement and a considerable body of evidence was amassed to refute it. (A. 210a-366a) The responses pointed out the statement's lack of compliance with the TA Rules and the Commission's order and noted that the statement was so vague that specific response was impossible. The respondents observed that they transported most of the traffic listed in the DoD statement and that they were unaware of any service complaints. They also denied the claimed interline delays, and delays at the various points due to late arrivals of their vehicles—rather the delay was shown by several exhibits to be due to late arrival of the vessels to be loaded. (e.g. A. 235a)

As the basis for its order of December 20, 1968, granting (for the second time) the authority sought, the Com-

mission was compelled to paraphrase DoD's inaccurate generalizations and unsupported conclusions. (A. 367a-370a)

The filing of the supplemental complaint in the court below, the full hearing on the merits, and the lower court's holdings are set forth in the briefs of appellants [20] and the decision, reported at 298 F. Supp. 1006, is included in the joint appendix. (A. 388a-400a)

III

HISTORY OF COMMISSION HANDLING OF TA APPLICATIONS

The Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act, 49 U.S.C. § 301 *et seq.*) requires full evidentiary hearings producing proof of public convenience and necessity before the Commission may authorize motor carrier operations. At the Commission's request, Congress amended the Act in 1938 by adopting a narrow exception to the above procedure in order to permit the granting of temporary authority, without hearings, at the Commission's discretion. The legislative history of the amendment is clear that the Commission was primarily seeking authority to cope with true emergencies. The Commission's justification used as examples "[t]he bringing in of oil wells in a new field and conditions created by a flood or other calamitous visitation. . . ." [21] Having enacted the Motor Carrier Act just three years previously in order to cure the overcrowded and overcompetitive situation in the industry by limiting permanent entry into the field, Congress was careful to include specific safeguards against the indiscriminate granting of temporary authority. Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. § 310a(a), as originally enacted, remains the same today:

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[20] Government Brief, pp. 10-11; AFL Brief, pp. 12-13.

[21] S. Doc. No. 154, 75th Cong., 3d Sess. 2-3.

> (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

One of the safeguards imposed by Congress in the 1938 amendment was the strict limitation in time upon the Commission's ability to grant temporary authority for not more than 180 days. In 1946 this safeguard was eliminated indirectly through Congress' passage of the Administrative Procedure Act (5 U.S.C. § 558).[22] As the Commission's authority under section 210a(a) evolved into a broader power than that originally granted, the Commission moved away from the ex parte summary disposition espoused by appellants and began providing other safeguards to preserve the service of existing carriers. The Commission, through its field offices, contacted motor carriers in the area to permit them to protest TA applications and to respond to the claim that existing motor carriers were incapable of providing the service needed.[23] Eventually, after 27 years of issuing temporary

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[22] In Pan-Atlantic S.S. Corp. v. Atlantic Coast R.R., 353 U.S. 436 (1957), this Court held that temporary authority is a "license with reference to an activity of a continuing nature" and, in accordance with section 9 of the A.P.A., remains in effect until the Commission has "finally determined" a corresponding application for permanent authority.

[23] See Bowen Transports v .United States, 116 F. Supp. 115, 117 (E.D. Ill 1953).

authorities, the Commission, on its own initiative, instituted a rulemaking proceeding. Representations of interested parties were submitted and, upon due consideration, the Commission prescribed procedural and substantive rules "to govern the filing, processing, and determination of applications by motor common and contract carriers for temporary operating authority." [24] These rules, set forth in their entirety as Appendix B hereto, are extensive and cover all phases of temporary authority proceedings. A brief summary of the six parts of these rules will emphasize the completeness of the Commission rulemaking in this area.

The first section recites the controlling statute, notes the applicability of the A.P.A. governing extensions of temporary authority beyond the statutory limitation, and defines several terms.

The second section concerns the filing of applications. All applications are to be filed at the Commission's field offices. Supporting statements must accompany applications and contain at least the eleven items of information enumerated. Emergency temporary authority applications (not involved here) follow special procedures and telegraphic and telephonic filings are permitted. Evidence of insurance and designated agents for service of process are necessary.

Part three provides for publication of a summary of the application in the Federal Register and the filing by interested persons of protests which must contain the specifics as to the service which such protestants can and will offer. This section also notes that the rate requirements of sections 217 or 218 of the Act must be met and places a 30-day compliance period within which a grantee must meet those requirements, as well as the insurance and service of process requirements.

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[24] Motor Carrier Temporary Authorities, 98 M.C.C. 483 (1965), 49 C.F.R. § 1131.

Part four governs the Commission's determination of applications. The Temporary Authorities Board or Division 1, acting initially, will make the first determination. Eight standards are set forth for determination of applications. These standards cover both general considerations and criteria for specific types of temporary authority applications, e.g., for single-line service, complete service to a shipper, and alternate routes.

Part five governs the timely filing of tariffs containing the rates, charges, and rules under which the grantee will operate.

Part six regulates the filing of petitions for reconsideration and replies thereto and states that the filing of such petitions will not operate as an automatic stay of an order granting temporary authority.

These rules are a logical outgrowth of the Commission's expansion of its authority under section 210a(a) of the Act. The original ex parte determination and summary procedures have yielded to a modified procedure which includes a no-oral hearing and provides substantial rights for both applicants and protestants. The Commission has not chosen to amend its rules since their promulgation four and a half years ago.

IV

SUMMARY OF ARGUMENT

Our position in this case can be stated briefly: the lower court's conclusions that the TA Rules are binding on the Commission and that the Commission did not substantially comply with them in granting temporary authority to American Farm Lines is based upon valid precedent and proper examination of the Commission proceeding.

As shown, the Commission chose to bind itself and limit its discretionary power after twenty-seven years of

experience in utilizing that power. This Court has already spoken on the importance of agency regulations and their binding power not only upon those who come before the agency but also upon the agency itself. *Service* v. *Dulles*, 354 U.S. 363 (1957).

Appellants' effort to read the lower court's decision as crippling the Commission's power to issue temporary authorities are strained. Strict compliance does not mean literal, mindless compliance. The Commission in its TA Rules requires, in mandatory terms, specific information as to shipper's efforts to obtain the needed service from existing carriers. The shipper, here had, in fact, utilized existing motor carriers for all its transportation needs until it began utilizing the services of the applicant, AFL. Furthermore, DoD thereafter continued to use the services of existing carriers along with those of AFL between all of the points for which temporary authority is sought. Thus DoD had fully-documented experience with existing carriers which would have been sufficient to comply with the TA Rules. Yet, the shipper chose to submit only general assertions of the inadequacy of existing services. These motor carriers were prejudiced by the Commission's decision to ignore its own rules and accept these general assertions. Existing motor carriers know of no service problems justifying the grant of authority made. If permitted to answer specific service failures, they feel certain they would have been able to refute them. But DoD did not refer to any specific failures. As a result grave economic losses to the existing motor carriers have resulted.

The issue raised by appellants as to whether the Commission possessed the power to reopen the proceeding, without permission of the lower court, after its order was stayed and review by the court was begun is clearly not dispositive of this appeal. The lower court's judgment may be affirmed solely upon the first issue. But, dealing with the merits of the second, the Commission is

"without power to act inconsistently with the Court's jurisdiction." *Inland Steel* v. *United States*, 306 U.S. 153, 160 (1939). That the Commission did exceed its power is clear from the fact that the Commission felt duty bound to request permission from the lower court, but never followed the rules of that court in order to receive a ruling thereon.

It is for these reasons we believe that this Court should affrm the lower court's judgment.

V

ARGUMENT

1. The Temporary Authority Regulations Are Binding On The Commission

The Commission set up in the TA Rules what it considered to be minimum standards of proof conforming to the statutory standards of section 210a(a) of the Act. The Commission must have felt that such standards were needed in order to assure an administrative record which would constitute the necessary evidence upon which it would then be able to determine whether there is "an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need," as required by the statute. The circumstances surrounding the enactment of the statutory authority and the promulgation of the TA Rules do not suggest, as appellants claim, that mere "guidelines" were being established. Therefore, the Commission must be deemed to have acted unreasonably when it condoned non-compliance with these rules by bestowing authority upon the party that violated them.

The courts have long held that regulations promulgated by an administrative agency in order to implement its statutory authority have the force and effect of law, and the agency as well as parties seeking determi-

nations thereunder, are bound by such regulations. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Mississippi Valley Barge Line* v. *United States*, 252 F. Supp. 162 (E.D. Mo. 1966); *Pacific Molasses Co.* v. *F.T.C.*, 356 F. 2d 386 (5th Cir. 1966); *Upjohn Co.* v. *Pennsylvania R. Co.*, 381 F. 2d 4 (6th Cir. 1967).

Appellants' arguments that the TA Rules were not intended to reduce the Commission's discretionary power must be rejected. In view of the terms of the TA Rules, the evolution of temporary authority grants and of the procedure therefore, and the background of the involved statute, there is no doubt that the TA Rules were intended and considered by the Commission to be followed. The regulations it promulgated are consistent with the clear language of the statute. The Commission chose to bind itself. Besides the mandatory language of the regulations themselves, the Commission further clarified its policy of reasonably strict adherence to these rules in a release issued two and a half years after they became effective.[25] This Court said, in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 422 (1942):

> Undoubtedly regulations adopted in the exercise of the administrative rule-making power, like laws enacted by legislatures, embody announcements of policy. But they may be something more. When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one "which we will follow in exercising our licensing power", they must be taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others

[25] The ICC policy release is set forth as Appendix B of the Government's Brief.

whose rights may be affected by the Commission's execution of them.

Even where the authority given to the agency is discretionary, this Court has upheld the rule that agencies must follow the requirements of their own regulations. *Service* v. *Dulles*, 354 U.S. 363 (1957); *Accardi* v. *Shaughnessey*, 347 U.S. 260 (1954); *Yellin* v. *United States*, 374 U.S. 109 (1963). And a lower court citing these cases held that agency action that substantially and prejudicially violates the agency's rules cannot stand. *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (C.A. D.C. 1959), *cert. denied*, 376 U.S. 915 (1964).

In *Service*, the Congressional statute conferred "absolute discretion" upon the Secretary of State to discharge State Department or foreign service employees "whenever he shall deem such termination necessary or advisable in the interests of the United States." This Court held that the Secretary bound himself to certain departmental regulations, despite his argument to the contrary, and that, by ignoring these regulations, the Secretary exercised his discretion illegally. Contrary to appellants' contentions, substantial rights are involved here. Unjustified, unwarranted and illegal competition remains a constant threat to the health and soundness of existing motor carrier businesses, which comprise an important segment of our national transportation system. Common carriers have concommitant duties and responsibilities generally to serve all shippers and to transport not only truckload, but also their less-than-truckload traffic. AFL, on the other hand, has limited its service to the "cream" of the traffic, DoD's truckload traffic. In a little more than two and a half years, AFL was permitted by DoD to siphon off from regulated carriers, traffic grossing almost $10 million dollars, in highly questionable operations. Under a grant of authority here, appellees' future condition would be considerably altered to an even greater

extent by further diversion of traffic.[26] Additionally, there is no element as important as the national security in *Service*, which must be balanced against the interests of existing carriers. Rather the Commission is promoting an absolute right to issue temporary authorities without regard to its own regulations and beyond the intention of the legislators that gave the Commission its discretionary power.

In *Accardi*, this Court was also concerned with self-imposed limitations on agency discretion. The regulations there prescribed the procedures to be followed in processing an alien's application for suspension of deportation and supplemented "the bare bones of § 19(c)" of the Immigration Act of 1917. The Attorney General was required by this Court to afford aliens the due process of adherence to those regulations before he could exercise his discretionary power either affirmatively or negatively. Likewise protestants here should be afforded the due process intended by the regulations governing TA proceedings, to wit, that the supporting shipper must provide the information specified in the regulations before the Commission may make its determination.

2. The Commission Did Not Substantially Comply With The Temporary Authority Regulations

In *Accardi*, *supra*, at p. 268, this Court said:

> It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. If such were the case, we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged *refusal to exercise* its own discretion contrary to existing valid regulations.

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[26] Appellant AFL noted in its Jurisdictional Statement at page 13 that final disposition of its permanent authority application is at least three years away.

Similarly, we are not here arguing the evidence; rather, we are objecting to the Commission's exercise of discretion and determination of immediate and urgent need in the face of a patent violation of valid temporary authority regulations. Items 1, 2, 3, 8 and 9 of the information which must be contained in any supporting letters were absent from DoD's support letter and subsequent support statement. These items are:

> (1) Description of the specific commodity or commodities to be transported (where the transportation of property in involved).
>
> (2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory, or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested).
>
> (3) Volume of traffic involved, frequency of movement, and how transported now and in the past.
>
> * * * *
>
> (8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> (9) Names and addresses of existing carriers who have either failed to refused to provide the service, and the reasons given for any such failure or refusal.

That the violations were patent is clear. In the first place, there was only one supporting shipper, so that the required information could not be gleaned from multitudinous letters of support.[27] Secondly, due to the ex-

[27] The Commission in one case considered 33 letters of support in their entirety to make its determination (Roadway Express, Inc. v. United States, 263 F. Supp. 154 (N.D. Ohio, 1966)) and over 400 letters in another more recent case (Bell Lines, Inc. v. United States, 1969 F. Carr. Cas. ¶ 82,139 (S.D. W. Va.), appeal docketed, No. 893, November 28, 1969).

tensiveness of the authority sought, the rules ((2) above) state that evidence of a *broad* need is required. Thirdly, a standard prescribed for single-line service applications (1131.4(b)(4)) notes that a grant of such applications is generally unwarranted and that they will be granted "only when it is clearly established that the carriers providing multiple-line service" are incapable or failed in meeting the shipper's reasonable needs. Fourth, the Commission, from the beginning of this administrative proceeding, was in possession of DoD's letter to AFL of April 30, 1968, which was a direct admission that AFL could not satisfy the statutory requirements. (A. 11a-12a) Fifth, the Commission admits that the lower court's first restraining order and that court's decision in *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968), were a clear signal of what was lacking in the basis of its grant of authority. (Government Brief, p. 19) And lastly, the Commission's order reopening the proceeding was a model of clarity in its instructions to DoD to supply the information it had not yet produced. (A. 170a-171a) Under these circumstances, there can be no excuse as to what was needed and why it was particularly necessary in light of the type of authority sought.

Appellants contend that protestants were in no way prejudiced by the lack of compliance exhibited in DoD's support letter and statement. Indeed, they now contend that appellees were not entitled to the information required to be furnished in any letter(s) of support. This argument stems from their proposition that protestants, under the rules, are only required to submit information as to the service they can and will offer. This reasoning cannot be taken seriously in view of the Commission's order of November 5, 1968. In that order reopening the proceeding to receive a "reinforced" support letter, the Commission further ordered that "protestants may submit verified statements in response to any statement sub-

mitted by applicant." (A. 170b) Surely the Commission was offering protestants no greater rights there than those already provided for in the TA Rules.

Appellees, along with other ICC-regulated carriers have hauled the freight which DoD ships for many, many years. In 1966, DoD began obtaining a cheaper and allegedly swifter service from AFL for a portion of this traffic. DoD, alone, is in the position to validate its claim that it needs AFL's service and that AFL's service is indeed more expeditious than that provided by existing certificated motor carriers. This largest of shippers, with vast numbers of employees, is in a unique position to supply the information required. Furthermore, the burden to make the necessary presentation is upon applicant with the assistance of its supporting shipper, and not upon protesting carriers. Protestants specified their ability and willingness to provide the service which DoD had already stated was adequate and had not complained of in the past. Protestants were not given the opportunity to reply to any *specific* instances of service refusals, failures, or deficiencies because none were claimed by DoD. This is the prejudice with which protestants were faced. General allegations based upon contrived rationalizations replaced concrete evidence of service inadequacy. The Government, in contending that "it is difficult to see how the absence of names and addresses and dates prejudiced the protestants in this case," makes sport of protestants' right to prove their own capabilities.

Appellants claim that the lower court demanded rigid, literal (rather than reasonable) compliance with the requirements of shipper's support letters and that this overtechnical approach has been summarily rejected by this Court in *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718. The important distinction between *Estes* and the present proceeding is that protestants in *Estes* did not allege that their "holding out" to the public was the

same as that of applicant. The Commission has continually found a difference between "general commodities", the authority held by protesting motor carriers in *Estes*, and "general commodities, moving in express service," the authority sought by Railway Express Agency, Inc., the applicant there. Because of this distinction, the requirement for an enumeration of any efforts made to obtain service from existing "general commodities" carriers became irrelevant. In contrast with the situation there, single-line service, as sought here, holds no "favored" position with the Commission; rather, the TA requirements for the enumeration of efforts to obtain existing service take on added significance so that the Commission can determine whether the shipper is merely expressing a "preference" for single-line service.

3. Lacking Permission, The Commission Did Not Possess Authority To Reopen The Proceeding After Its Order Was Stayed And Review By The Lower Court Was Begun

The lower court's holding on this issue was supplementary to its finding that both the original application with its cursory letter of support and the "reinforced" support statement were deficient in meeting the requirements of the TA Rules. The lower court was, however, clearly concerned with the Commission's attempt to nullify its review by reopening the administrative proceeding after the court had assumed jurisdiction. The court cited one of the Commission's own decisions, *Central Freight Lines, Inc.* v. *Strickland Transp. Co., Inc.*, 102 M.C.C. 291, 298:

> Moreover, when the Court has exercised jurisdiction to review and suspend a report and order of the Commission, we are without power to act inconsistently.

On review of that decision, in *Strickland Transportation Co.* v. *United States*, 274 F. Supp. 921, 925 (N.D. Tex.

1967), *aff'd per curiam*, 389 U.S. 574 (1968), the district court said:

> When a reviewing court has set aside administrative action found not supported by the evidence and has remanded the matter for further consistent proceedings, the Commission is without power to act except in accord with the court's mandate. Inland Steel Co. v. United States, 1939, 306 U.S. 153, 59 S. Ct. 415, 83 L. Ed. 557. . . . Courts are not procedural pawns whose opinions can be frustrated through administrative misadventure. . . .
>
> It is not pride or arrogance that makes it important that echelons, tiers, and hierarchies of courts be more than tables of organization. Our judicial system is premised on tiered decisions. We are not dealing with the trivia of a pecking order but are concerned that the words of a higher court command the respect due them.

The Commission now advances the argument that it was attempting to alleviate the necessity of longer judicial proceedings when it became aware of the deficiencies in its original grant of authority through the lower court's proceedings on the temporary injunction as well as through that court's decision in *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968). The reopening, according to the Commission, was for the purpose of complying with that court's rulings. (Government's Brief, p. 27). However, in light of the fact that the reopened proceeding elicited none of the information which the lower court found was required by the Commission's own rules, and that, despite this, the Commission again granted the same authority to AFL, it appears that the Commission attempted to frustrate the lower court with a more formidable record to support its administrative decision without acceding to the primary principle consistently upheld by that court—that agencies must follow their validly promulgated regulations.

The Commission contends (1) that the proceeding was not administratively final and (2) that, regardless of administrative finality, its proceedings are always open for rehearing and review, so long as its actions are not inconsistent with the jurisdiction of a reviewing court. (Government's Brief, pp. 23-24)

As to the "administrative finality" of the Commission's processing of AFL's application for temporary authority at the time complaint was filed below, much is made in AFL's brief of the continued activity by various appellees in filing petitions for reconsideration, and otherwise participating in further proceedings before the Commission. (AFL's Brief, pp. 40-43) It is certainly true that some of the appellees herein filed petitions for reconsideration prior to their initiation of proceedings seeking judicial review. In view of the Commission's neglect of its own rules throughout the proceeding, this further attempt to gain a reversal of the order granting authority to AFL cannot be construed as an admission that the decision of Division 1, acting as an appellate division, was not administratively final. The Commission must be blamed for any confusion because of its own past actions not in accordance with the rules.

Once judicial review proceedings were begun, appellees did not continue to petition the Commission for reconsideration.[28] Appellees remained steadfast in their conviction that the court assumed exclusive jurisdiction over the matter. When the Commission, on November 7, 1968, moved the lower court to stay further proceedings on the ground that it had already reopened the proceeding two days earlier in order to receive additional evidence from the Department of Defense, appellees promptly filed a reply thereto on November 14, 1968, contending that the

[28] Appellant AFL, at page 41 of its brief, inaccurately attributes several petitions for reconsideration filed by three protestants after court review was begun to appellees herein. Those protestants were neither complainants below nor appellees here.

Commission was without authority to proceed further. Appellees fully expected that the Commission would call its motion for argument, as, indeed, it should have.

Appellees continued participation in the administrative proceeding consisted of petitions to the Commission to vacate its order, and upon the failure of the Commission to rule thereon, responses to the support statement of the Department of Defense. Appellees considered that response was necessary in order to protect their legitimate interests and to preserve their right to further participate in the event the court should grant the Commission's motion for a stay and permission to reopen. Their participation thus did not constitute acquiescence in the propriety of the Commission's reopening order.

In determining the question of "administrative finality," who filed what is not as important as what the rules, as interpreted by reasonable men, provide. The TA Rules must be read in the first instance. These rules are complete, substantively and procedurally, as shown *supra* (pp. 13-14). Rule 1131.6(a) provides:

> (a) *Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 *initially* granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person. (Emphasis supplied)

The September 3, 1968, order was issued by Division 1 of the Commission acting in an appellate capacity, which situation fits neither of the above categories. Where the TA Rules apply to all three decisions (i.e. of the TA Board and of the Division acting initially or in an appellate capacity), they so state. For instance, TA Rule 1131.4 (b) reads, in part:

> The following standards shall be used by the Temporary Authorities Board, and by Division 1 of the Commission acting initially or *in an appellate capacity*. . . . (Emphasis supplied)

Promulgated in 1965, the TA Rules take precedence over the General Rules of Practice promulgated much earlier. Furthermore, the TA Rules are specific in this regard. To ignore that specificity here is to render the rules meaningless and violative of the normal rules of construction. *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222 (1957).

The Commission's inconsistency and error are equally evident. On the one hand, it denies the substantive importance of the TA Rules. On the other, it would impose all of the procedural provisions of the General Rules of Practice governing reconsideration to the processing of temporary authority applications.[29] The TA Rules were promulgated to provide a modified procedure for the processing of temporary authority applications; in an expedited proceeding, a limited review process by the Commission is necessary and reasonable. The General Rules of Practice had no applicability to the processing of temporary authority applications, prior to the promulgation of the TA Rules, because there was no established proceeding for TA applications. The phrase in TA Rule 1131.6(a), *supra*, "[p]ursuant to and in accordance with the Commission's General and Special Rules of Practice," obviously applies to the time within which petitions may be filed, number of copies, and the other minor details found in General Rule 1100.101, which are not covered by, and are not in conflict with the TA Rule.

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[29] Were the General Rules applicable here, then we submit that there is a strong judicial holding, based on a thorough study of the Congressional history of the enactment of section 17 of the Interstate Commerce Act, that a decision of an appellate division is not further reviewable by the Commission. Transamerican Freight Lines, Inc. v. United States, 258 F. Supp. 910 (D. Del., 1966).

The Commission's other attempted justification for reopening its proceeding after judicial review was begun is that it possesses continuing jurisdiction over its orders and, not otherwise bound by statute, it may reopen and reconsider its proceedings at any time.[30] The Commission admits being limited by the *Inland Steel* principle, but finds no inconsistency in its action here. It considers that it possesses jurisdiction to review its orders even while judicial review is pending, regardless of authorization from the reviewing court. Clearly, this cannot be the principle espoused by this Court in *Inland Steel Co.*

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[30] As the Commission notes in its brief (p. 26, n. 17), it has proposed legislation (S. 2242, 91st Cong., 1st Sess.) to amend section 17 of the Act to provide for review of its orders in courts of appeals. The proposal is based upon the recommendations of the Administrative Conference of the United States, Committee on Judicial Review. The Committee recommended a procedure similar to review of orders of the Federal Communications Commission, the Federal Maritime Commission, the Secretary of Agriculture and the Maritime Administration, found at 28 U.S.C. §§ 2341-2351. Noticeably lacking therein, yet grafted onto the proposed legislation submitted by the Commission, is the section it referred to in its brief, i.e., permitting reopening up to the time the Commission dockets the record.

Another section of the proposed legislation (not referred to in the Commission's brief) is, we suggest, more pertinent as conforming to the accepted concepts of judicial review and is similar to the review procedure of orders of the agencies mentioned above. That section reads, in part:

> If a party to a proceeding to review shall apply to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shall show to the satisfaction of such court (1) that such additional evidence is material, and (2) that there were reasonable grounds for failure to adduce such evidence before the Commission, such court may order such additional evidence and any evidence the opposite party desires to offer to be taken by the Commission. The Commission may modify its findings of fact, or make new findings, by reason of the additional evidence so taken and may modify or set aside its orders and shall file in the court such additional evidence, such modified findings or new findings, and such modified order or the order setting aside the original order.

A contrary view would make a mockery of court review of agency decisions whenever an agency whose action became the subject of a complaint chose to exercise its "discretion" to—for all practical purposes—recall the case from the court in order to "cooper up" its decision under review. To paraphrase the *Strickland* court's language, courts should not be procedural pawns whose authority can be frustrated, whether by administrative misadventure or, as here, deliberate agency action.

VI

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, it is submitted that this Court should affirm the judgment of the court below.

Respectfully submitted,

WILLIAM B. ADAMS
624 Pacific Building
Portland, Oregon 97204

PETER T. BEARDSLEY
NELSON J. COONEY
1616 P Street, N. W.
Washington, D. C. 20036

Attorneys for Appellees

CERTIFICATE OF SERVICE

I, Nelson J. Cooney, one of the attorneys for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of February, 1970, I served copies of the foregoing Brief on the several parties hereto, as follows:

1. On the United States of America, by mailing copies in duly addressed envelopes, with postage prepaid, to Honorable Erwin N. Griswold, Solicitor General, and John H. D. Wigger, Esq., Department of Justice, Washington, D. C. 20530.

2. On the Interstate Commerce Commission, appellant, by mailing copies, in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, and Arthur J. Cerra, Esq., its Associate General Counsel, at the office of the Commission, Washington, D. C. 20423.

3. On American Farm Lines, appellant, by mailing copies, in duly addressed envelopes, with postage prepaid, to its counsel of record, Joseph A. Califano, Jr., Esq., John D. Hawke, Jr., Esq., and Kenneth A. Letzler, Esq., 1229 19th Street, N. W., Washington, D. C. 20036; and William L. Peterson, Jr., Esq., and James M. Robinson, Esq., 401 North Hudson, Suite 200, P. O. Box 917, Oklahoma City, Oklahoma 73101.

4. On other appellees, by mailing copies, in duly addressed envelopes, with postage prepaid, to their counsel of record, William H. Dempsey, Jr., Esq., 734 Fifteenth Street, N. W., Washington, D. C. 20005; Ed White, Esq., 517 West Adams St., Chicago, Illinois 60608; and Robert E. Joyner, Esq., 2111 Sterick Building, Memphis, Tennessee 38103.

APPENDIX A

NAMES OF APPELLEES HEREIN

Alamo Express, Inc.
American Trucking Associations, Inc.
Black Ball Freight Service
Braswell Motor Lines, Inc.
Brown Express, Inc.
Central Express, Inc.
Central Forwarding, Inc.
Central Freight Lines, Inc.
Consolidated Copperstate Lines
D-C International, Inc.
Garrett Freightlines, Inc.
H. S. Anderson Trucking Co.
IML Freight Inc.
J. H. Rose Truck Line, Inc.
J. J. Willis Trucking
J. V. Harrison Truck Lines, Inc.
Miller Truck Line, Inc.
Navajo Freightlines, Inc.
Pacific Intermountain Express Co.
Red Arrow Freight Lines
Robertson Tank Lines, Inc.
T.I.M.E. Freight, Inc.
Transcon Lines, Inc.
Western Gillette, Inc.

APPENDIX B

49 CFR 1131. TEMPORARY AUTHORITY APPLICATIONS UNDER SECTION 210a(a) OF THE INTERSTATE COMMERCE ACT

Section

1131.1 Controlling legislation and definitions.
1131.2 Filing of applications.
1131.3 Processing of applications.
1131.4 Determination of applications.
1131.5 Rates, charges, and special permission applications.
1131.6 Petitions for reconsideration.

§ 1131.1 Controlling legislation and definitions.

(a) *Controlling legislation.* Section 210a(a) of the Interstate Commerce Act, as amended, 49 U.S.C. 310a (a), which the rules and regulations in this part are designed to implement, provides as follows:

To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

Extensions of temporary authority beyond 180 days are governed by the special rules, contained in Part 1101 of this chapter, promulgated pursuant to section 558 of the Administrative Procedure Act, 5 U.S.C. 558.

(b) *Definitions.* As used in this part, the following words and terms are construed as follows:

(1) *"Temporary authority".* Limited-term motor carrier operating authority issued for periods up to 180 days (TA) pursuant to section 210a(a) of the Interstate Commerce Act to authorize transportation service for which there is an immediate and urgent need and which cannot be met by existing carrier service. This term includes "emergency temporary authority" issued for periods of 30 days or less (ETA) to meet an immediate and urgent need for service due to emergencies, in which time or circumstances do not reasonably permit the filing and processing of an application for temporary authority (TA).

(2) *"Common carrier by motor vehicle".* Same as defined in section 203(a)(14) of the Interstate Commerce Act (49 U.S.C. 303(a)(14)).

(3) *"Contract carrier by motor vehicle."* Same as defined in section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)).

(4) *"Aggregate of 180 days".* The total number of days of temporary authority which may be granted to a motor carrier under the provisions of section 210a(a) of the Interstate Commerce Act to meet a continuing need for a particular service.

(5) *"Person".* Same as defined in section 203(a)(1) of the Interstate Commerce Act (49 U.S.C. 303(a)(1)).

§ 1131.2 Filing of applications.

(a) *General.* All temporary authority applications are filed at and initially processed by the Commission's field offices. The field staff of the Commission's Bureau of Operations conducts preliminary investigations into applications for temporary authority and transmits the applications, with recommendations as to their disposi-

tion, to the Commission's Temporary Authorities Board in Washington, D.C. The Bureau's field offices maintain records of authorized carriers and their operating authorities, and its staff members are available for consultation and to give assistance in the obtaining of motor carrier service, and guidance in the preparation of temporary authority applications and related supporting material, and in making rate, insurance, and other required filings. The field offices will furnish copies of necessary forms upon request.

(b) *How and where filed.* A separate application for each temporary authority sought must be filed on Form BOR-95 (§ 1003.1 of this chapter). The signed original and six copies of each application and all supporting documents must be filed with the Bureau of Operation's field office which has jurisdiction over the point at which applicant is domiciled, or such other field office as the Commission may designate in special circumstances.

(c) *Supporting statements.* Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

(d) *Special procedures for filing applications for emergency temporary authority.* (1) Emergency temporary authority should be applied for only where emergency conditions exist which do not permit sufficient time to afford the notice specified in § 1131.3(a). Applications for emergency temporary authority must be filed on Form BOR-95 (§ 1003.1 of this chapter).

(2) Where the emergency is found to continue beyond the period of the initial grant, the emergency temporary authority may be extended only upon written request until disposition is made of the longer term temporary authority application.

(3) In the cases where the urgency of the situation warrants, the supporting statements of those having the immediate and urgent need for carrier service may be furnished by telegram. However, such telegram must contain substantially the federal information which is more fully described in paragraph (c) of this section. The telegram must be sent to the Bureau of Operations' field staff member who is handling the application.

(4) In processing emergency temporary authority applications, it often becomes necessary to use telephone and telegraph service to verify rate levels and the absence of existing carriers' service, and to submit the Bureau of Operations' field report to the Temporary Authorities Board in Washington, D.C. As Government funds are not available to pay such communication expenses, the applicant must have or make arrangements with the telephone and telegraph companies so that such costs can be charged to its account.

(e) *Insurance and service of process.* (1) Where the applicant is an authorized carrier, a statement must accompany the application indicating whether evidence of effective insurance is on file with the Commission and whether agents for service of process have been designated for each State in which operations are conducted

or proposed. If applicant is not an authorized carrier, it should furnish a statement containing the name of its insurance company, its policy number, the effective and expiration dates of such policy, the limits contained therein, and a copy of the Commission's Form BOC 3 (§ 1003.1 of this chapter) designating an agent for service of process in each State where operations are proposed to be conducted. If such carrier does not have appropriate insurance it may submit a statement, which includes the name of its insurance company and of its intent to effect compliance before commencing operations if the authority is granted.

(2) On emergency temporary authorities where time does not permit the submission of the required written statement by applicant, a telegraphic statement may be accepted.

§ 1131.3 Processing of applications.

(a) ***Notice to interested persons***—(1) *Service.* Notice of the filing of temporary authority applications tendered shall be given by the publication of a summary of the authority sought in the FEDERAL REGISTER, except that no such summary will be published in the case of emergency temporary authority applications. Such summaries will be prepared by the appropriate Bureau of Operations supervisor and forwarded to the Office of Proceedings, Washintgon, D.C.

(2) ***Filing of protests.*** Any interested persons who can and will provide all or any part of the proposed service may file a protest against the application. Such protest must be specific as to the service which such protestant can and will offer and must consist of a signed original and six (6) copies which must be filed with the district supervisor named in the FEDERAL REGISTER publication within 15 calendar days after the date notice of the filing of the application is published in the FEDERAL REGISTER. One copy of such protest must be served on

the applicant or its authorized representative, if any, by U.S. mail or in person.

(b) *Publication of rates and charges.* A carrier may not lawfully perform transportation under a grant of temporary authority unless and until compliance has been made with the rate and other requirements of section 217 of the Interstate Commerce Act in the case of common carriers and of section 218 of the act in the case of contract carriers, as provided in § 1131.5.

(c) *Revocation for noncompliance, and reinstatement and extension of time for making compliance.* (1) Temporary authority is approved subject to compliance within 30 days, or within such additional time as the Commission may approve, with the applicable provisions of the statute and the requirements, rules, and regulations prescribed by the Commission thereunder governing the filing of rate and contract publications, the filing of acceptable evidence of security for the protection of the public and designation of agents for service of process.

(2) If compliance is not made within the 30-day period, or within the time allowed in any extension thereof applicant will be notified that the temporary authority order is of no further force and effect. Where this occurs, applicant may make written request for reinstatement of the granting order if it so desires, provided (i) that such request is made within 20 days from the date of the notice, (ii) that good cause can be shown as to why compliance was not made within the time allowed, and (iii) that the request for reinstatement contains positive assurance that applicant is now able to and will comply immediately with all applicable requirements, if the order is reinstated.

§ 1131.4 Determination of applications.

(a) *General.* (1) Initial determination of temporary authority applications will be made by the Commission's

Temporary Authorities Board or by Division 1 of the Commission, acting initially. For purposes of administration, distinctions in the applicable grounds of approval and rate filings will be maintained as between temporary authority of not more than 30 days (ETA), and temporary authority of up to 180 days (TA). No successive grants of temporary authority shall exceed a total of 180 days, and, if a grant of an emergency authority results in a total aggregate temporary authority grants of more than 180 consecutive days, such total, to the extent that it exceeds 180 days, will be reduced accordingly.

(2) While a grant of temporary authority is neither a permit nor a certificate under the Interstate Commerce Act it nevertheless enables the applicant to provide service either as a common or a contract carrier, as the case may be. Consequently, an applicant for temporary authority to operate as a motor contract carrier must show that the operation proposed is that of a contract carrier by motor vehicle as defined in section 203(a)(15) of the Interstate Commerce Act; that is, that the applicant serves one or a limited number of shippers, and that the service proposed involves either the assignment of vehicles to the supporting shipper's exclusive use or the provision of a transportation service designed to meet the distinct needs of that shipper. No "dual operation" finding is necessary, however, where a grant of temporary authority to operate as a contract carrier is made to an existing common carrier and vice versa.

(3) Since a grant of temporary authority is not a permit or certificate, none of the related rights, under the Interstate Commerce Act, such as the incidental charter rights of passenger carriers and the implied authority to perform terminal services at points within the commercial zone but beyond the corporate limits of named municipalities, is applicable. Temporary authority may not be tacked or joined with permanent authority held by the carrier for the purpose of performing through

transportation, nor can through, joint-line service be performed thereunder. Where there is a need for such services which are not implicit in grants of temporary operating authority this fact should be stated specifically so that an appropriate authority description may be issued.

(4) For administrative convenience, temporary authority to transport property will be considered to authorize the return transportation of shipper-owned trailers and of empty crates, barrels, bottles, hangers, pallets, bracing, dunnage, and other similar containers and shipping devices used in the outbound transportation covered by the temporary authority.

(b) *Standards for determination.* The following standards shall be used by the Temporary Authorities Board, and by Division 1 of the Commission acting initially or in an appellate capacity, in the absence of special or unusual circumstances, in the determination under section 210a(a) of the Interstate Commerce Act (49 U.S.C. 310a (a)) of applications for temporary authority.

(1) *General.* (i) Grants of temporary authority shall only be made upon the establishment of an immediate and urgent need for the transportation of passengers, or of particular commodities or classes of commodities, from specified origin points or areas to specified destination points or areas, having no carrier service capable of meeting such needs. Requests for temporary authority involving service to or from entire States, counties, or other defined areas will warrant approval only when supported by evidence that there is a compelling need for service to or from a representative number of points in each such State, county, or area, that there is a reasonable certainty that such service will be utilized, and that there is no carrier service available capable of meeting such need. Otherwise, such grants will be limited in accordance with the evidence to point-to-point authorizations covering the immediate and urgent need for service.

(ii) Any need which is the basis of an operation authorized by a temporary authority to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a "continuing nature" unless the Commission otherwise expressly determines. If the need for a particular service ceases and a temporary authority covering such need expires or is revoked, and a new or separate need arises subsequent to such expiration or revocation, additional temporary authority for the 180-day aggregate, or for a shorter period, may be granted to the same carrier for the service, notwithstanding the prior grant or grants. However, an application filed after an aggregate of 180 days temporary authority has expired or been revoked will be denied unless the facts clearly show that the application is in reality based on a new need and not a continuation of the need on which the prior grant of authority was based.

(2) *Immediate and urgent need.* An immediate and urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service. Such a showing may involve a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, a failure of existing carriers to provide service, or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed.

(3) *Emergency temporary authority.* An immediate and urgent need justifying a grant of emergency temporary authority will be determined to exist only where it is established that existing carrier service is not capable of providing transportation service to meet immediate and actual emergencies, such as, for example, to prevent a plant shutdown, to move particular shipments in the

interest of the national defense, to meet needs resulting from fires, floods, storms, or other disasters which affect the public health, safety, and welfare, disruption in existing carrier services by work stoppages, unexpected cessation of existing transportation service, lack of equipment capable of transporting the involved commodity, failure or lack of storage facilities and imminent spoilage of perishable commodities, or comparable situations which make it impracticable to afford the notice specified in § 1131.3 (a).

(4) *Single-line service.* Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

(5) *Complete service.* Requests for temporary authority on the basis of "providing a complete service to a shipper," even though existing carriers are participating in the traffic and in many instances can provide a substantial part of the service, require special justification. Generally, in such instances, the applicant must establish with reasonable certainty that the existing carriers cannot adequately serve the shipper in their authorized territories, or that the supporting shipper has revised its distribution methods to such an extent that there actually is an immediate and urgent need for the complete service proposed.

(6) *Failure to provide equipment.* Temporary authority may be granted where existing authorized carriers are unable or refuse to furnish equipment necessary to

move passengers or the traffic of shippers in order to meet an immediate and urgent transportation need.

(7) *Alternate routes.* Except in unusual circumstances, temporary authority to operate over an alternate route will not be granted, even though the service route may be circuitous, since the carrier-applicant may now operate between the points involved.

(8) *General bases for disapproval.* Applications for temporary authority may be denied for the following reasons:

(i) Failure to meet statutory standards.

(ii) Unfitness of the applicant.

§ 1131.5 Rates, charges, and special permission applications.

(a) Rates requirements generally.

(1) *Motor common carriers.* A motor common carrier may not lawfully perform transportation until effective rates and provisions are published, posted, and filed with the Commission as required by section 217 of the Interstate Commerce Act and the Commission's rules and regulations issued thereunder. Rates to be established upon less than thirty days' notice must not be less than existing motor common carrier commodity rates on the same commodities in like quantities from and to the same points, or in absence thereof not less than the motor common carrier commodity rates in the same commodities in like quantities from and to nearby points for similar distances. In the absence of exiting motor common carrier commodity rates, the rates to be established on less than thirty days' notice shall not be less than the applicable motor common carrier class rates from and to the same points except as otherwise authorized in paragraph (b) of this section. Detailed instructions on rate filings may be obtained from any Bureau of Operations' field office.

(2) *Motor contract carriers.* A motor contract carrier may not lawfully provide transportation until executed transportation contracts, when required, and schedules of rates and charges are on file with the Commission as required by section 218 of the Interstate Commerce Act and the Commission's rules and regulations issued thereunder. The filing of contracts covering transportation of passengers, currency, bullion, and certain other valuable articles is not required. Except as otherwise authorized in paragraph (b) of this section, the rates proposed to be established upon less than thirty days' notice shall not be lower than permitted under subparagraph (1) of this paragraph if applicant were a common carrier, except that if any of the points of origin, destination, or territory to be served is at the time served by a contract carrier transporting the same commodities, the rates and charges may be made on the same or higher basis as those of such contract carrier, or those maintained by applicant between other points in the same area.

(3) *Notice of rate publication required.* In most cases there is outstanding special permission authority to publish rates on less than statutory notice covering transportation service by and for the Railway Express Agency and the substitution of motor for rail service. Most tariff publishing agents also have outstanding special permission authority to publish on short-notice scope of operating rights to be granted pursuant to a temporary authority application and to add new participating carriers to their tariffs. The temporary authority application must state who will make the tariff publication, and whether it is to be made on thirty days' notice or upon less than thirty days' notice.

(4) *Special permission applications.* (i) If publication is to be made on short notice by the carrier filing the temporary authority application and it is not covered by the outstanding special permission authority referred to in paragraph (b) (1) of this section, such temporary

authority application must be accompanied by a special permission application (four copies with original signed and notarized), setting forth the proposed rates clearly and completely. An accompanying exhibit may be used if identified by letter, such as Exhibit "A", and so referred to in the application. If the proposed provisions consist of rates, all points of origin and destination must be shown or definitely indicated. If permission is sought to establish a rule, the exact wording of the proposed rule must be shown. If relief from tariff circular rules is sought, the exact form of publication must be shown.

(ii) The special permission application must contain the names of motor carriers known to maintain competitive rates; charges, or rules between the same points or points related thereto, together with adequate identification of tariffs containing such rates, charges, or rules. It must also state whether such carriers have been advised of the proposed rates, charges, or rules and whether they have been advised that it is proposed to establish such provisions on less than thirty days' notice. The rates, charges, or rules proposed to be established should conform to the competitive rate level standards of subparagraph (1) of this paragraph for motor common carriers or subparagraph (2) of this paragraph for motor contract carriers. In the absence of effective commodity rates via competing carriers on the commodity or commodities to be transported, the Special Permission Board, upon a proper showing, may authorize the establishment of rates on a different level.

(b) *Emergency temporary authority.* (1) *Property carrier.* Each application for emergency temporary authority for 30 days or less, except those involving the Railway Express Agency or substitution of motor for rail service, shall be accompanied by a statement of the rates, charges, and rules to be filed under Special Permission M-60160 and M-60161, §§ 1307.100, 1307.101 of this chapter, for use in the event the authority sought is

granted. Such statement shall contain the names of competing motor carriers transporting the same commodities and the rates of such carriers between the same points or from or to nearby points for similar distances and the application will not be acted upon until such statement shall have been furnished by the applicant to the district supervisor.

(2) *Existing rates.* If the statement of the proposed rates submitted with the emergency temporary authority application contains rates or charges lower than existing rates described under paragraphs (a) (1) or (2) of this section by the named or other carriers, approval will not be recommended or authority granted. All emergency temporary authority will be expressly conditioned on establishing rates or charges no lower than those set forth in the application, and a "W" tariff naming rates lower than those set forth in the application will be rejected. Emergency temporary authority will be revoked for failure to seasonably file a proper "W" tariff.

(3) *Suspended or special permission rates.* (i) In every case the carrier shall state in its emergency authority application whether there is under suspension at the time any rates published for its account, or whether an application for special permission authority to file its rates on less than 30 days' notice has been granted or denied, covering the same traffic from and to the same points in connection with another temporary or permanent authority application. If the applicant has rates or other tariff matter under suspension, or has received or been denied special permission to file on less than 30 days' notice any rates not yet effective, covering the same traffic, the district supervisor will not recommend approval of the request nor will a grant be made of the emergency temporary authority.

(ii) If applicant carrier has rates under suspension covering the same traffic, it should file a special permission application as set forth in paragraph (a) (4) of this

section, stating a copy was served upon protestant(s) and requesting short notice authority to cancel the suspended matter and to file rates according to paragraphs (a) (1) or (2) of this section or, in the alternative, state that the suspended rates will be defended and request short notice authority to file rates conforming with paragraphs (a) (1) or (2) of this section to apply during the suspension period, such rates to expire at the end of the suspension period.

(4) *Passenger carriers.* (i) Each application for emergency temporary authority must be accompanied by an application for special permission to publish fares and charges in connection therewith if they are proposed to be made effective on less than 30 days' statutory notice. Such application shall be accompanied by a statement of the fares, charges, and rules to be filed if the authority is granted. Authority to file fares and charges on less-than-statutory notice will be granted only when the proposed fares and charges are on a level which does not undercut or disrupt the existing level of the fares and charges between the points involved maintained by competing motor carriers generally in the same territory.

(ii) The special permission application must contain the names of motor carriers known to maintain competitive fares, charges, or rules between the same or related points, together with accurate identification of the tariffs by I.C.C. numbers, containing such fares, charges, and rules. It must also state whether such competing carriers have been advised of the fares and charges proposed to be established upon less-than-statutory notice.

§ 1131.6 Petitions.

(a) *Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority

in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person.

(b) *Replies.* Replies may be filed by any interested person to such petitions; but if the facts stated in any such petition disclose a need for accelerated action, such action, in the discretion of the Commission, may be taken before expiration of the time allowed for reply. Replies received after accelerated action on petition will be treated as petitions for reconsideration of the accelerated action and given corresponding accelerated action.

(c) *Petitions for reconsideration.* The filing of a petition for reconsideration of an order of Division 1 or the Temporary Authorities Board does not have the effect of automatically staying such order, and the grantee carrier may conduct the operations authorized by such order upon compliance with its tariff, insurance, and other requirements for the duration of the temporary authority, or until otherwise ordered.